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IN THE

Supreme Court of the United States

SL SERVICE, INC. (formerly Sea-Land Service, Inc.) and CARRIERS CONTAINER COUNCIL, INC.,

Petitioners,

v.

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO; LOCAL 1351, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; and SOUTH ATLANTIC AND GULF COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

– *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-40208

LOCAL 1351 INTERNATIONAL LONGSHOREMENS ASSOCIATION; SOUTH ATLANTIC AND GULF DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Plaintiffs-Appellees,

versus

SEA-LAND SERVICE INC; CARRIERS' CONTAINER COUNCIL,

Defendants-Appellees,

versus

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO (OPEIU),

Movant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Appendix A

Before GARWOOD, BARKSDALE and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Before the court is a jurisdictional dispute involving two unions. The disputes began roughly in 1994 and involve the apportionment of employees assigned to work the gate at Sea-Land's Houston port facility. Defendant-Appellee Sea-Land Service, Inc. ("Sea-Land") is a party to separate collective bargaining agreements with both Plaintiff-Appellee Local 1351 International Longshoremen's Association ("ILA") and Movant-Appellant the Office & Professional Employees International Union ("OPEIU"). Both agreements contain similar grievance procedures providing for the resolution of disputes through arbitration. The district court ordered Sea-Land and the unions to participate in a tripartite arbitration. For the following reasons, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Both unions in this case contest the assignment of work by Sea-Land at its Port of Houston ("Port") facility, specifically the number of OPEIU and ILA employees that should be employed to do record keeping and clerical work at the container terminal in accordance with their respective collective bargaining agreements. Prior to 1992, ILA clerks obtained documentation at the terminal and gave handwritten forms to OPEIU clerks who would either then type the data or enter it into a computer system. In 1992, Sea-Land purchased a new computer system which made it unnecessary

to have the information written first, and then inputted. Sea-Land assigned the remaining work of collecting the data and entering it into the computer system to ILA.

OPEIU filed a grievance against Sea-Land protesting the loss of this work. On May 5, 1995, OPEIU and Sea-Land entered into a bilateral arbitration. The arbitrator found that OPEIU and ILA were entitled to share the work at the container terminal 50-50. On June 28, 1996, OPEIU obtained a judgment in the Southern District of New York enforcing the arbitrator's award.[1] Thereafter, on July 24, 1997, OPEIU filed another grievance regarding the allocation of work at the Port facility, alleging that Sea-Land was not in compliance with the arbitration award and accompanying court judgment. After Sea-Land denied the grievance, OPEIU contacted the arbitrator on July 30, 1997, and a hearing was scheduled on the grievance for September 17, 1997 ("Marx arbitration").

ILA did not participate in the arbitration proceedings held between OPEIU and Sea-Land. On March 4, 1997, ILA asserted two grievances also protesting the assignment of work at the Port to employees represented by OPEIU. The Local Industry Grievance Committee found that all clerical work at the gate of the Port facility must be performed exclusively by ILA. Following completion of this arbitration, which did not include OPEIU,[2] on August 22, 1997 ILA

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1. The judgment confirming the award was issued in *OPEIU v. Sea-Land Servs., Inc.*, No. 96-CV-3043 (S.D.N.Y. 1996) by Judge Robert P. Patterson, Jr.

2. OPEIU was not a party to the collective-bargaining agreement between ILA and Sea-Land; it did not receive notice of or participate in the ILA/Sea-Land grievance proceedings.

brought suit in the Southern District of Texas before Judge Samuel Kent seeking to confirm the arbitration award which enforced the two grievance awards. As an affirmative defense, Sea-Land argued that the arbitration award which had been confirmed in the Southern District of New York's judgment ordered it to divide the work in question equally between ILA and OPEIU. OPEIU was neither named or served in this present action. However, ILA and Sea-Land asked for a stay of the Marx arbitration scheduled to take place between OPEIU and Sea- Land, and Judge Kent granted this stay.

On September 12, 1997, pursuant to Federal Rule of Civil Procedure 19 ("Rule 19"), the district court joined OPEIU as an indispensable party. At the same time, the district court stayed further bilateral arbitration proceedings between OPEIU and Sea-Land.[3] The court then denied

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3. In response to ILA's and Sea-Land's request to stay the proceedings in OPEIU's case, Judge Kent said:

> I'm troubled right now with the notion of whether I have jurisdiction to go around telling arbitrators and people who are not immediately before the Court what to do, but I'm willing to try, and until the Circuit says I can't, I guess I can . . . . Give me a proposed order that stops everything in its track right now.

After the arbitration, Judge Kent denied OPIEU's motion to reconsider, writing that:

> [B]ecause this Court had no knowledge of [the Southern District of New York's] decision, this Court acted

(Cont'd)

OPEIU's motion to dismiss[4] on October 3, 1997. On October 9, the district court ordered all parties to re-arbitrate their dispute in one tripartite arbitration proceeding. OPEIU then filed a motion to reconsider and asked that the court vacate its other orders regarding OPEIU. OPEIU attended the arbitration because of the threat of a show cause order levied by Judge Kent. At the arbitration, held November 17-18, 1997, OPEIU objected on the record but did not participate further in the arbitration. OPEIU offered no evidence or witnesses at the tripartite arbitration hearing.

On January 7, 1998, the arbitrator rendered his award, awarding all the work in dispute to ILA. On January 13, 1998, the district court confirmed the award *sua sponte*, simultaneously dismissing ILA's claims against Sea-Land with prejudice and denying OPEIU's motion to reconsider and request that the district court vacate its order staying arbitration and ordering tripartite arbitration.

(Cont'd)

> promptly in accordance with substantial authority . . . . If this Court overstepped its bounds, the Court respectfully notes that the Fifth Circuit can sort it out.

Apparently, Judge Kent *did* have knowledge of Judge Patterson's decision. At the hearing involving a stay several months earlier, Judge Kent told counsel for Sea-Land (who had informed him of the OPEIU arbitration award) that "I'm not interested in getting into some catfight with another district Judge."

4. OPEIU had moved to dismiss for lack of jurisdiction because it had been neither named nor served in the suit and because it is not a party to the ILA/Sea-Land collective-bargaining agreement.

Appendix A

OPEIU moved for an order in the Southern District of New York for enforcement of its original judgment against Sea-Land. On May 4, 1998, Judge Patterson of the Southern District of New York denied OPEIU's motion. The district court stated "we agree with the Texas court that tripartite arbitration provided a pragmatic solution." In April 2000, the Second Circuit affirmed the New York district court's denial of OPEIU's motion seeking enforcement of the prior judgment which had been awarded in its favor. *See OPEIU v. Sea-Land*, 210 F.3d 117 (2nd Cir. 2000)

DISCUSSION

I. *Standard of Review*

We exercise plenary, de novo review of a district court's assumption of subject matter jurisdiction. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992). We also review a district court's grant of a motion to compel arbitration de novo. *See Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998).

II. *Subject Matter Jurisdiction*

Appellant argues that the district court did not have subject matter jurisdiction over OPEIU's dispute with Sea-Land and therefore, was without authority to order OPEIU to participate in the tripartite arbitration. We must satisfy ourselves, independent of the district court's analysis, that we have jurisdiction over the case. *See Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 n.6 (5th Cir. 1994). The district court's basis for ordering OPEIU

to participate in the present case is that under FED. R. CIV. P. 19 OPEIU is an indispensable party to this litigation. Rule 19 provides for the joinder of persons necessary for a just adjudication. In pertinent part, the Rule states that

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any one of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party.

FED. R. CIV. P. 19(a).

Joinder was appropriate in the present case because the underlying issue in this action is a dispute between OPEIU and ILA over how many workers each is entitled to have at the Port facility gate. Although ILA filed this action, both unions have an interest in how the work will be allocated. It is also clear that the separate grievances filed regarding the allocation of this work left Sea-Land with inconsistent

obligations. Consequently, joinder was proper in accordance with Rule 19 because a final resolution of this dispute would be severely hindered without OPEIU's presence. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107-09, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

As another basis for jurisdiction over this matter, appellees cite 29 U.S.C. § 185 (the Labor Management Relations Act § 301 ("LMRA")), and 9 U.S.C. § 9 (Federal Arbitration Act, "FAA"). Both the LMRA and the FAA grant jurisdiction over parties who are signatories to the collective-bargaining agreement in dispute. *See, e.g. Ramsey v. Signal Delivery Serv., Inc.*, 631 F.2d 1210, 1212 (5th Cir. 1984) (observing that suits under the LMRA "are confined to defendants who are signatories of the collective-bargaining agreement under which they are brought"); *Commercial Metals Co. v. Balfour, Guthrie & Co. Ltd.*, 577 F.2d 264, 268-69 (5th Cir. 1978) (holding that a federal question must exist before jurisdiction is conferred by the FAA). The federal courts also have broad discretion in implementing the policies embodied in our national labor laws. *See Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456-57, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

ILA filed the present action seeking confirmation of the arbitrator's award which enforced ILA's two grievance awards. These grievance awards were based on the collective bargaining agreement between ILA and Sea-Land. Therefore, the district court clearly had jurisdiction to confirm ILA's two grievance awards. Although OPEIU is not a signatory to the collective bargaining agreement between ILA and Sea-Land, OPEIU does have a separate collective bargaining

agreement with Sea-Land that mandates arbitration. Because assignment of work at the Port facility is the central issue of ILA's dispute and any decision would effect OPEIU and its collective bargaining agreement, the district court had broad discretion to exercise jurisdiction under LMRA.

III. *Authority to Compel Tripartite Arbitration*

Appellant argues that the district court did not have authority to order OPEIU, ILA and Sea-Land into a joint tripartite arbitration absent an agreement between the three parties to participate in this type of arbitration. This court has previously addressed whether three parties who are signatories to two separate agreements can be ordered to submit to tripartite arbitration. *See Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 148 (5th Cir. 1987). In *Del E. Webb*, we reversed a district court's consolidation of separate claims among a contractor, a construction company, and an architect. *See id.* at 147-48. We there observed that "the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration." *Id.* at 149. We also held that, under § 4 of the FAA, a district court may not order tripartite arbitration unless all three parties consent in writing to arbitration in the agreement itself, even if the result is piecemeal litigation. *See id.* at 147, 150.[5]

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5. *See also, Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 277 (7th Cir. 1995) (noting that the Supreme Court "has repeatedly emphasized that we must rigorously enforce the parties' agreement as they wrote it, even if the result is piece-meal litigation"); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 74

(Cont'd)

Appendix A

While *Del E. Webb* is instructive the facts of the present case differ significantly because this is a labor dispute. The Supreme Court has noted that labor arbitration should not be treated in the same manner as arbitration of general commercial disputes. In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) the Court stated that:

> [T]he run of arbitration cases . . . becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial

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(Cont'd)
(2nd Cir. 1993) (holding that a district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) (holding that a court is not permitted to interfere with private arbitration agreements in order to impose its own view of speed and economy, even where the result would be the inefficient maintenance of separate proceedings); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that the Supreme Court "has explicitly rejected the assertion that the overriding goal of the [FAA] is to promote the expeditious resolution of claims"); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) (stating that "[p]arties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in").

> strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

363 U.S. at 578 (internal citations omitted). Specifically, the Supreme Court has recognized the place of tripartite arbitration in labor disputes. The Court has observed that,

> In order to interpret [a collective-bargaining] agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.

Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157, 161, 87 S.Ct. 369, 17 L.Ed.2d 264 (1967).

Other circuits have affirmed tripartite arbitration orders in situations where two unions have received conflicting arbitration awards or where a union is seeking to be awarded work that may lead to a grievance from another union. *See, e.g. United States Postal Serv. v. National Rural Letter Carriers' Ass'n*, 959 F.2d 283, 286-87 (D.C. Cir. 1992);

Retail, Wholesale & Dep't Store Union, Local 390 v. Kroger Co., 927 F.2d 275, 281 (6th Cir. 1991) (involving conflicting bilateral arbitration awards); *United States Postal Serv. v. American Postal Workers Union*, 893 F.2d 1117, 1119 (9th Cir. 1990); *Local 850, Int'l Ass'n of Machinists v. T.I.M.E.-DC, Inc.*, 705 F.2d 1275, 1277 (10th Cir. 1983) (involving conflicting awards); *Columbia Broadcasting Sys., Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1328-29 (2nd Cir. 1969).

While tripartite arbitration is generally favored in these types of labor disputes, the major procedural obstacle to ordering it in the present case is that the Southern District of New York had already entered a final judgment affirming the arbitrator's decision in the grievance filed by OPEIU against Sea-Land. None of the cases in which courts ordered tripartite arbitration have involved an earlier arbitration award which has already been confirmed by a district court's final judgment. *See e.g., Retail, Wholesale & Dep't Store Union*, 927 F.2d at 276-77 (union who received arbitration award first ordered into tripartite arbitration when it sought confirmation of that arbitration award); *Columbia Broadcasting System*, 414 F.2d at 1327 (employer sought tripartite arbitration before entering bilateral arbitration with either of the two unions).

The district court itself recognized that a final judgment had been entered by another district court. The district court sidestepped this issue, however, by questioning the validity of the New York court's decision because ILA had not been joined as a party. The Supreme Court has previously indicated that an arbitration award may be unenforceable if

an indispensable party is missing from the litigation. *See Transportation-Communication*, 385 U.S. at 159. The Second Circuit, in affirming the Southern District of New York decision, explained that the essence of the New York court's decision was that ILA was a necessary party to the initial arbitration in New York between Sea-Land and OPEIU, and that ILA's absence "rendered continued enforcement of the judgment entered on that award in New York inequitable." *OPEIU*, 210 F.3d at 122. The Second Circuit held that "the New York court had the power to decline to enforce the judgment confirming an arbitration award because a change in circumstances had made clear that the dispute was a jurisdictional labor dispute, that tripartite arbitration was the proper and necessary vehicle to resolve the dispute." *Id.* at 123.

Despite the Second Circuit's holding that the New York district court appropriately declined to enforce its previous judgment the Second Circuit declined to rule on the issue that is squarely before us in this case, namely whether the Texas district court erred in ordering tripartite arbitration. *Id.* at 124 ("The issue of whether the Texas action constituted an impermissible collateral attack on the Southern District of New York judgment, or whether the Texas Court erred in ordering tripartite arbitration, is not before us."). The actions of the district court in regards to the dispute between Sea-Land and OPEIU violate the rule of collateral estoppel and res judicata. *See Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1166 (5th Cir. 1981) (stating that those doctrines apply where the issues are identical, the issue has been previously litigated, and the determination of the issue previously was a critical and necessary part of the judgment in that earlier

action); *see also Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1135 (5th Cir. 1992) (holding that collateral estoppel applies to arbitration proceedings); *Miller Brewing Co. v. Fort Worth Distributing Co., Inc.*, 781 F.2d 494, 498 (5th Cir. 1986) (holding that res judicata precludes a party's seeking relief through arbitration when such relief would be barred in the courts). Consequently, the district court should not have disturbed the final judgment and ordered OPEIU to participate in a tripartite arbitration. Although as the Second Circuit noted, Judge Patterson may have properly refused to enforce his initial judgment, and acknowledged that tripartite arbitration was the appropriate solution, this only occurred after the Southern District of Texas had ordered the tripartite arbitration in October 1997. OPEIU, relying on the final judgment, essentially refused to participate in the tripartite arbitration. OPEIU should not be penalized for relying on a final judgment. *See United Food and Commercial Workers Union AFL-CIO v. Pilgrim's Pride Corporation*, 193 F.3d 328, 331 (5th Cir. 1999) (stating that although a district court might later modify its enforcement order of an arbitration award, this does not diminish the order's finality or present effect). Therefore, the district court's decision to order a tripartite arbitration, although well intentioned, was inappropriate in the wake of the final judgment which OPEIU had obtained.[6]

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6. Because we have concluded that the district court erred in ordering the tripartite arbitration we will not address the appropriateness of the district court's confirmation of the tripartite arbitration award.

Appendix A

CONCLUSION

Although achieving fair and complete resolution of this multi-faceted dispute through tripartite proceedings was the laudable objective of the district court, the procedural posture of the parties at the time the judgment was entered militated against pursuing tripartite arbitration. Arguably, piecemeal litigation will result from this holding, but the alternative course of action — making a party who has relied on a final judgment subsequently submit to another arbitration — is not congruent with the controlling case law. Accordingly, the district court's judgment is REVERSED and REMANDED for proceedings consistent with this opinion.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40208
D.C. Docket No. G-97-CV-489

LOCAL 1351 INTERNATIONAL LONGSHOREMENS ASSOCIATION; SOUTH ATLANTIC AND GULF DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Plaintiffs – Appellees

v.

SEA-LAND SERVICE INC; CARRIERS' CONTAINER COUNCIL

Defendants – Appellees

v.

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO (OPEIU)

Movant – Appellant

Appeal from the United States District Court for the Southern District of Texas, Galveston

Before GARWOOD, BARKSDALE and STEWART, Circuit Judges.

Appendix A

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: AUG 15 2000

APPENDIX B — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION DISMISSING PLAINTIFF'S CLAIMS WITH PREJUDICE, DENYING DEFENDANT'S MOTION TO RECONSIDER AND CONFIRMING ARBITRATION AWARD DATED JANUARY 13, 1998 AND ENTERED JANUARY 14, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-97-489

LOCAL 1351, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND SOUTH ATLANTIC & GULF DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

V.

SEA-LAND SERVICE INCORPORATION AND CARRIERS CONTAINER COUNCIL

ORDER DISMISSING PLAINTIFFS' CLAIMS WITH PREJUDICE, DENYING DEFENDANT'S MOTION TO RECONSIDER AND CONFIRMING ARBITRATION AWARD

Plaintiffs, the International Longshoremen's Association ("ILA"), filed this case on August 22, 1997 seeking confirmation and enforcement of two grievance awards issued pursuant to the terms of a collective bargaining

agreement. Plaintiffs only sued Defendants Sea-Land Service Incorporation and Carriers Container Council (collectively "Sea-Land"); however, this Court subsequently joined the Office and Professional Employees International Union ("OPEIU") on September 12, 1997. After staying further bilateral arbitration between OPEIU and Sea-Land, the Court Ordered all parties to participate in one arbitration proceeding. This Court then denied OPEIU's Motion to Dismiss on October 3, 1997. Now before the Court is OPEIU's Motion to Reconsider and Request that the Court Vacate Its Order Staying Arbitration and Vacate Its Order for Tripartite Arbitration. Also before the Court is the arbitrator's award resulting from the tripartite arbitration. For the reasons that follow, OPEIU's Motion is **DENIED**, the arbitration award is **CONFIRMED**, and all of Plaintiffs' claims are **DISMISSED WITH PREJUDICE.**

I. FACTUAL SUMMARY

This is a jurisdictional dispute involving two unions. Sea-Land is a party to separate collective bargaining agreements with both the ILA and OPEIU. Both agreements contain similar grievance procedures providing for the resolution of disputes through arbitration.

Both unions in this case contest the assignment of work by Sea-Land at its Port of Houston facility, specifically the number of OPEIU and ILA employees that should be employed at the facility gate in accordance with their respective collective bargaining agreements. On May 5, 1995, after resolution of bilateral arbitration between OPEIU and Sea-Land, OPEIU obtained a Judgment in New York

Federal Court (No. 96-CV-3043 June 28, 1996) enforcing the arbitrator's award. Subsequently, Sea-Land and OPEIU entered into a settlement agreement on April 3, 1997. Thereafter, on July 24, 1997, OPEIU filed another grievance regarding the allocation of work at the Port facility, therein alleging that Sea-Land was not in compliance with the arbitration award and accompanying court judgment. ILA did not participate in the arbitration proceedings held between OPEIU and Sea-Land.

On March 4, 1997, ILA asserted two grievances also protesting the assignment of work at the Port of Houston to employees represented by OPEIU. Following completion of arbitration, which did not include OPEIU, ILA brought this case on August 22, 1997 seeking to confirm that arbitration award. At that time, pursuant to FED. R. CIV. P. 19, OPEIU was properly joined as an indispensable party. At the same time, this Court Stayed further bilateral arbitration proceedings between OPEIU and Sea-Land, and Ordered all parties to re-arbitrate their dispute in one tripartite arbitration proceeding. That arbitration is now complete and is before the Court.

II. ANALYSIS

A. OPEIU Is a Proper Party to this Suit.

FED. R. CIV. P. 19 provides for the joinder of persons necessary for a just adjudication. Rule 19 provides in pertinent part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose

> joinder will not deprive the court of jurisdiction over the subject matter shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any one of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise *inconsistent obligations* by reason of the claimed interest. If the person has not been joined, the court *shall order* that the person be made a party.

Fed. R. Civ. P. 19 (emphasis added).

The underlying substance of this action is a dispute between OPEIU and ILA over how many workers each is entitled to have at the Port of Houston facility gate. Any resolution that only involves Sea-Land and *one* of these unions will most certainly be an incomplete and unjust determination. Moreover, as is already evident from the facts of this case, such incomplete justice also subjects Sea-Land to inconsistent obligations resulting from inconsistent arbitration awards. Thus, because a final resolution of this union jurisdictional dispute cannot be accorded unless both unions claiming the work in dispute participate in these proceedings, and because OPEIU's presence does not deprive the Court of jurisdiction, joinder was proper in accordance with Rule 19. *See Provident Tradesmens Bank & Trust Co.*

v. Patterson, 390 U.S. 102, 107-09, 88 S. Ct. 733, 737, 19 L.Ed.2d 936 (1968); *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873 (5th Cir. 1970).

B. Stay of Arbitration and Tripartite Arbitration Is Proper

Prior to 1985, it was clear that § 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14, authorized a District Court in appropriate circumstances to stay or enjoin arbitration proceedings. *See Tai Ping Ins. Co. v. M/V Warschau*, 731 F.2d 1141, 1144 (5th Cir. 1984). However, after *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L.Ed.2d 158 (1985), the Supreme Court made clear that a court faced with an arbitrable claim has no discretion and must compel arbitration. *See id.* at 217-18, 105 S. Ct. at 1240-41. The circumstances of this case are clearly different from those in *Byrd*. In this case, the Court merely stayed arbitration temporarily to ensure the participation of all necessary parties. The Court then Ordered tripartite arbitration. Thus, having already established that OPEIU is a proper party to this action, it is clear that this Court was well within its authority to temporarily stay the arbitration pending between OPEIU and Sea-Land. Any arguments to the contrary are rejected.

Although arbitration appears in many respects to be similar to litigation, it is in fact *sui generis*. *See Amalgamated Meat Cutters and Butcher Workmen of North America v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817, 819 (5th Cir. 1973) (upholding an arbitrator's award and opining that it was permissible to allow the arbitrator to establish the burden of proof he felt appropriate); *see also Forsythe Intern., S.A.*

v. Gibbs Oil Co., 915 F.2d 1017, 1021 (5th Cir. 1990) ("We merely ask here whether the [arbitration] panel discharged its duty measured by the more *modest* procedural and evidentiary strictures of arbitration." (emphasis added)). Arbitration acts as a speedy and informal alternative to litigation, resolving disputes without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials. *See Wilko v. Swan*, 346 U.S. 427, 436-37, 74 S. Ct. 182, 187-88, 98 L.Ed. 168 (1953), *overruled on other grounds*, *Rodriguez-De Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989). Thus, rigorous procedural limitations may not be superimposed on the very process designed to avoid such limitations. *See Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D. N.Y. 1957). The informal nature of arbitration proceedings effectuates the national policy favoring arbitration, and such proceedings require "expeditious and summary hearing, with only restricted inquiry into factual issues." *Legion Ins. Co. v. Insurance General Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S. Ct. 927, 940, 74 L.Ed.2d 765 (1983)). As the Fifth Circuit has observed: "Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial. But because 'the advantages of arbitration are speed and informality, an arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him.' " *Forsythe, Intern.*, 915 F.2d at 1021-22 (quoting *Fairchild & Co., Inc. v. Richmond, F. & P. R.*, 516 F. Supp. 1305, 1313 (D.C. Cir. 1981)).

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Sea-Land is a party to separate collective bargaining agreements with both the ILA and OPEIU. Both agreements contain a grievance procedure providing for the resolution of disputes through arbitration. Although OPEIU admits that it is a party to a collective bargaining agreement with Sea-Land which mandates arbitration, OPEIU contends that this Court's Order of tripartite arbitration was improper because OPEIU and ILA are not parties to the same agreement.

In support of their argument, OPEIU cites *Del E. Webb Const. v. Richardson Hosp. Authority*, 823 F.2d 145 (5th Cir. 1987). In *Del E. Webb*, the defendant entered into two separate arbitration agreements with a contractor and architect. After being sued by the contractor, the defendant brought a third-party claim against the architect. The architect then sued the contractor. The District Court ordered tripartite arbitration of all claims, including the architect's counterclaim against the contractor. Focusing on the lack of a written agreement between the architect and contractor, the Fifth Circuit reversed the District Court's order of tripartite arbitration. *See id.* at 147.[1]

Del E. Webb is easily distinguishable from the situation before the Court. Indeed, read properly, *Del E. Webb* supports this Court's Order of tripartite arbitration. In this case ILA does not seek relief from OPEIU. Instead, ILA (like OPEIU) seeks relief from Sea-Land. If this were a case where OPEIU was being forced to arbitrate a nonarbitrable claim brought *against* ILA with ILA, the prohibition of *Del E. Webb* would apply. It is not. Instead, this is a case where two allegedly

1. Indeed, the arbitration agreement at issue in *Del E. Webb* specifically excluded the architect absent his consent.

aggrieved unions have similar claims against Sea-Land. Both of these unions have agreed to arbitrate their respective claims; simply because they did so in separate writings is of no moment to this Court. It is clear that prior attempts at bilateral arbitration have not resolved the jurisdictional dispute. Not only is tripartite arbitration a pragmatic and efficient solution in this case, it is the only logical solution that will actually end this dispute. Although the Fifth Circuit has not *directly* addressed it, there is substantial authority which supports the mandate of tripartite arbitration under the circumstances which exist here. *See, e.g., Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1328-29 (2d Cir. 1969); *Retail, Wholesale & Dep't Store Union, Local 390 v. Kroger Co.*, 927 F.2d 275, 281 (6th Cir. 1991); *United States Postal Serv. v. American Postal Workers Union*, 893 F.2d 1117, 1119 (9th Cir. 1990); *Local No. 850, International Association of Machinists v. T.I.M.E.-D.C., Inc.*, 705 F.2d 1275, 1277 (10th Cir. 1983); *United States Postal Serv. v. National Rural Letter Carriers Assoc.*, 959 F.2d 283, 286-87 (D.C. Cir. 1992). To achieve fair and complete resolution, it is imperative that all parties to a dispute participate. So long as all parties have consented to arbitrate under the circumstances, tripartite arbitration allows for this participation. Therefore, OPEIU's Motion to Reconsider is **DENIED.**

C. Tripartite Arbitration Award

District courts have jurisdiction to review the tripartite arbitration proceeding pursuant to 29 U.S.C. § 185. Such review is extremely limited in its scope. *See Antwine v.*

Prudential Bache Securities, Inc., 899 F.2d 410, 413 (5th Cir. 1990) ("Judicial review of an arbitration award is extraordinarily narrow . . . ."); *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989). Indeed, the Fifth Circuit has repeatedly stated that an arbitration award should "not be vacated unless: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers." *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995); *Manville Forest Prods., Corp. v. United Paperworkers Intern.*, 831 F.2d 72, 74 (5th Cir. 1987) (stating that a court reviews an arbitration award by asking whether an arbitration award "stems from fraud or partiality; . . . concerns a matter not subject to arbitration under the contract; . . . does not 'dra[w] its essence' from the contract; . . . or . . . violates public policy."). Through this limited prism, District Courts also retain the power to vacate awards when they are found to be arbitrary or capricious, or in violation of public policy. *See Forsythe Intern.*, 915 F.2d at 1021 (positing that an arbitration award should be vacated if it is fundamentally unfair); *Manville Forest Prods.*, 831 F.2d at 74 (opining that an arbitration award should be vacated if violates public policy); *International Ass'n of Machinists & Aerospace Workers, Dist. No. 145 v. Modern Air Transport, Inc.*, 495 F.2d 1241, 1244 (5th Cir. 1974) (noting that an arbitration decision must have a "foundation in reason or fact."); *Brotherhood of R.R. v. Central Georgia Ry. Co.*, 415 F.2d 403, 412 (5th Cir. 1969) (opining that an arbitration

award should be enforced so long as it has a basis that is "rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement."). After a careful and thorough examination of the arbitration award, the Court concludes that no bases exist to vacate it. Therefore, the arbitration award, in its entirety, is **CONFIRMED,** and all of Plaintiffs' claims are **DISMISSED WITH PREJUDICE.**

III. CONCLUSION

The Court understands that, in some form, this jurisdictional dispute has existed since 1992. For the first time, all of the necessary parties have participated in meaningful and complete arbitration of this dispute. It is the Court's sincere desire that the arbitrator's award will finally bring closure to this fight. The Court is cognizant of the final judgment awarded by Judge Robert Patterson of the Southern District of New York. This Court understands that such a judgment is entitled to full faith and credit, but respectfully notes that ILA was not a party to that final judgment. The Court seriously questions the validity of dispute resolution when an indispensable party, for whatever reason, is absent. *Cf. Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 159, 87 S. Ct. 369, 370-71, 17 L.Ed.2d 264 (1966) (refusing to enforce an arbitration award because an indispensable party was absent during the proceedings). Moreover, the Court ponders why a dispute involving a facility no more than forty miles from this Court would be decided by another Federal Court over two thousand miles away. Nevertheless, because this Court was confronted with parties seeking immediate resolution, and

because this Court had no knowledge of its brethren's decision, this Court acted promptly in accordance with substantial authority. Indeed, at this juncture, the arbitration has already taken place and is now confirmed. If this Court overstepped its bounds, the Court respectfully notes that the Fifth Circuit can sort it out.

For the reasons state above, the arbitration award before the Court is *sua sponte* **CONFIRMED** in its entirety and all of Plaintiffs' claims are **DISMISSED WITH PREJUDICE.** Defendant's Motion to Reconsider is hereby **DENIED.** The parties are **ORDERED** to bear their own taxable costs and expenses incurred herein to date. The parties are also **ORDERED** to file no further pleadings on these issues in this Court, including motions to reconsider or the like, unless justified by a compelling showing of new evidence not available at the time of the instant submissions. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the Fifth Circuit Court of Appeals, as may be appropriate in due course.

IT IS SO ORDERED.

DONE this 13th day of January, 1998, in Galveston, Texas.

s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-97-489

LOCAL 1351, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND SOUTH ATLANTIC & GULF DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

V.

SEA-LAND SERVICE, INCORPORATION AND CARRIERS CONTAINER COUNCIL

FINAL JUDGMENT

For the reasons set in the Court's Order in this matter issued on this date, the arbitration award before the Court is *sua sponte* **CONFIRMED** in its entirety and all of Plaintiffs' claims are **DISMISSED WITH PREJUDICE.** The parties are **ORDERED** to bear their own taxable costs and expenses incurred herein to date. The parties are also **ORDERED** to file no further pleadings on these issues in this Court, including motions to reconsider or the like, unless justified by a compelling showing of new evidence not available at the time of the instant submissions. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the Fifth Circuit Court of Appeals, as may be appropriate in due course.

Appendix B

THIS IS A FINAL JUDGMENT.

DONE this 13th day of January, 1998, in Galveston, Texas.

s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 7, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40208

LOCAL 1351 INTERNATIONAL LONGSHOREMENS ASSOCIATION; SOUTH ATLANTIC AND GULF DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Plaintiffs – Appellees

v.

SEA-LAND SERVICE INC; CARRIERS' CONTAINER COUNCIL

Defendants – Appellees

v.

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO (OPEIU)

Movant – Appellant

Appeal from the United States District Court for the Southern District of Texas, Galveston

Appendix C

ON PETITION FOR REHEARING
AND REHEARING EN BANC
(Opinion 06/09/00, 5 Cir., __, __ F.3d __)

Before GARWOOD, BARKSDALE and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Carl E. Stewart
United States Circuit Judge

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO v. SEA-LAND SERVICE, INC.* DATED AND FILED JUNE 28, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 CIVIL 3043 (RPP)

In the Matter of the Arbitration

– between –

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO and OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO LOCAL 129,

Petitioner,

– against –

SEA-LAND SERVICE, INC.,

Respondent.

JUDGMENT

Petitioner having moved for an order pursuant to T. 29 U.S.C. Sec. 185 and T. 9. U.S.C. Sec. 9, (1) confirming the Opinion and Award of the Arbitrator dated May 5, 1995 in all respects; and (2) directing that Respondent Sea-Land immediately post-two job positions for OPEIU employees

at the gate house and that those employees be awarded back pay to May 20, 1995, with interest thereon; and (3) directing that Petitioner recover from Respondent its costs and reasonable attorneys' fees occasioned by this proceeding; and (4) granting such other and further relief as the Court may seem just and proper, and the said petition having come before the Honorable Robert P. Patterson, Jr., United States District Judge, and the Court thereafter on June 25, 1996, having rendered its Memorandum Endorsement, granting the said petition, it is,

ORDERED, ADJUDGED AND DECREED: That the Opinion and Award of the Arbitrator dated May 5, 1995 is hereby confirmed in all respects, and it is further,

ORDERED, ADJUDGED AND DECREED, that Respondent is hereby directed to post two job positions for OPEIU employees at the gate house and those employees are awarded back pay to May 20, 1995 with interest, and it is further,

ORDERED, ADJUDGED AND DECREED, that Petitioner is entitled to it's costs and reasonable attorney's fees; the above-entitled action is closed and removed from the Court's active docket.

DATED: New York, New York
June 28, 1996

JAMES M. PARKISON
Clerk of Court

BY: s/ John S. Hagen
Deputy Clerk

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO v. SEA-LAND SERVICE, INC.* DATED MAY 4, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 3043 (RPP)

In the Matter of the Arbitration

Between

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO and OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO LOCAL 129,

Petitioner,

– and –

SEA-LAND SERVICE, INC.,

Respondent.

OPINION AND ORDER

* * *

Appendix E

Robert P. Patterson, Jr., U.S.D.J.

Petitioner moves for an Order pursuant to Rule 70 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and 29 U.S.C. § 185:(1) enforcing the judgement, dated June 28, 1996, which confirmed an arbitration Opinion and Award dated May 5, 1995; (2) enforcing the Settlement Agreement, dated April 3, 1997; (3) awarding back pay and lost overtime; and (4) directing the recovery of costs and reasonable attorneys' fees.

Background

On June 28, 1996, this Court entered a Judgement confirming the Opinion and Supplementary Award of Arbitrator Herbert L. Marx, Jr. ("Marx"), dated May 5, 1995 (the "Award"). This award held that Sea-Land Services, Inc. ("Sea-Land") had violated its collective bargaining agreement ("CBA") with the Office & Professional Employees International Union Local 128 ("OPEIU") by assigning work at the Houston Gate, which OPEIU claimed had been historically performed by its members, to employees represented by the International Longshoremen's Association ("ILA"). Peacock Aff. Ex. B. The ILA was not a party to this arbitration. The Award held that the OPEIU was entitled to fifty percent (50%) of the jobs performing gate functions. *Id.* ¶ 5. Petitioner, claiming that Sea-Land had refused to comply with the Award, petitioned this Court for confirmation of the Award, and this Court granted the requested petition on June 28, 1996. *Id.* ¶ 6 and Ex. A. Claiming that Sea-Land was still refusing to comply with the Award, and this Court's judgement, OPEIU sought

further assistance of the Court, and on April 3, 1997, after the Court had directed Sea-Land to appear at a hearing, Sea-Land and OPEIU entered into a Settlement Agreement. *Id.* ¶ 7 and Ex. C. A Stipulation of Compliance, incorporating the Settlement Agreement, was submitted by the parties to this Court, and was so ordered on April 16, 1997. *Id.* ¶ 7 and Ex. D.

Petitioner claims that, less than three months after the Settlement Agreement was reached, Sea-Land again reallocated work, giving a majority of positions to ILA employees in violation of the Award and the Settlement Agreement. *Id.* ¶¶ 8-9. Petitioner responded by filing a new grievance on July 24, 1997, and when this grievance was denied, seeking a new hearing in front of Marx, which was scheduled for September 17, 1997. *Id.* ¶ 11-14.[1]

The ILA also filed a grievance against Sea-Land, claiming the right to gate work at the Houston Terminal, including the right to positions, previously held by ILA-represented employees, transferred to the Houston Gate from Maersk Lines. Pursuant to ILA's CBA this grievance was referred to the Local Industry Grievance Committee ("LIGC") which, according to Sea-Land, is the legal equivalent of an independent arbitrator. Resp't Mem. at 4.

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1. In a letter dated July 30, 1997, Marx wrote that he believed that he no longer retained jurisdiction over the implementation of the remedy directed in his Supplementary Award, However, he stated that he was prepared to resolve any new grievances pertaining to current violations CBA violations after they had been processed through the pre-arbitral steps of the grievance procedure. Resp't Mem. Ex. 9.

Appendix E

The LIGC awarded jurisdiction over work at the Houston Gate to ILA-represented employees of Sea-Land and also awarded ILA jurisdiction over Maersk work, taken over by Sea-Land in July 1997. *Id.* Ex. 11. On September 4, 1997, the ILA filed a Verified Petition to Confirm and Enforce Grievance Award, in the United States District Court for the Southern District of Texas Galveston Division (the "Texas Court") naming Sea-Land and the Carriers Container Council ("CCC") as defendants. *Id.* Ex. 12. OPEIU was not named as a party. In its answering papers Sea-Land informed the Texas Court of the previous arbitral decision involving OPEIU and the fact that this decision had been confirmed by this Court. *Id.* Ex. 14.

On September 12, 1997, Judge Samuel B. Kent of the Texas Court ordered a stay of the OPEIU/Sea-Land arbitration scheduled for September 17, 1997, finding that the scheduled arbitration could interfere with the Texas Court's jurisdiction. *Id.* Ex. 15. The Texas Court also ordered the ILA, Sea-Land and the OPEIU, to submit the names of proposed arbitrators to preside over a tripartite arbitration "to hear the disputes considering both OPEIU and ILA's rights and contracts." *Id.* OPEIU moved to have the Texas lawsuit dismissed for lack of jurisdiction. *Id.* Ex. 16. Sea-Land opposed this motion, supported tripartite arbitration, and argued that OPEIU was a necessary party under Fed. R. Civ. P. 19. *Id.* Ex. 17. OPEIU's motion to dismiss was denied on October 3, 1997. *Id.* Ex. 18. On October 9, 1997, Judge Kent ordered the ILA, Sea-Land and OPEIU to submit to tripartite arbitration and appointed Reagan Burch as Arbitrator. *Id.* Ex. 19. This arbitration took place on November 17 and 18, 1997. Oral arguments were

heard before this Court on December 18, 1997. On January 7, 1998, arbitrator Burch issued his decision in the tripartite arbitration.[2] Burch, holding that neither the Marx arbitration nor the LIGC arbitrations had precedential value because neither had considered the rights of both the ILA and the OPEIU, ruled that the ILA was entitled to all of the disputed work at the Sea-Land gate. On January 14, 1998, Judge Kent confirmed the tripartite arbitration award, *sua sponte*, and denied OPEIU's Motion for Reconsideration. *Local 1351, Int'l Longshoremen's Assoc. v. Sea-Land Service, Inc.*, 1998 WL 15101 (S.D.Tex.).

OPEIU argues that Sea-Land acted in contravention of the Judgement of this Court, and misled the LIGC tribunal by representing that the work in question had traditionally been performed by ILA-represented employees, despite the fact that the earlier arbitral award, confirmed by this Court, found that the work had traditionally been divided between ILA and OPEIU on a fifty-fifty basis. Peacock Aff. ¶ 18 and Ex. J. OPEIU seeks this Court's intervention to obtain compliance with the Judgement, and argues that Sea-Land should be held in contempt for ignoring the directives of this Court and engaging in collateral action to block the private grievance resolution process provided for in the CBA between Sea-Land and OPEIU. *Id.* ¶ 20.

Sea-Land claims that it is not out of compliance with the Settlement Agreement, and that new disputes, including whether work taken in from other carrier companies must

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2. In his decision Burch reported that all parties appeared and were offered a full opportunity to present evidence.

be shared under the arbitration award, and whether the use of seven ILA clerks for a temporary weekend yard inventory project gives rise to a claim for additional OPEIU jobs, are subject to new arbitrations, as indicated by Marx in his letter of July 30, 1997. Resp't Resp. ¶ 2. It further urges this Court to defer to the tripartite arbitration, since confirmed by the Texas Court, because this arbitration considered the rights of all parties affected by the underlying disputes at issue.

Discussion

The crux of the problem with which this Court is now confronted is that there are two conflicting arbitral awards both of which have been confirmed by district courts, the award from the bilateral arbitration between OPEIU and Sea-Land confirmed by this Court, and the tripartite arbitration award confirmed by the Texas Court.[3]

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3. At the time the current motion was brought, and at the time of oral argument, there had not yet been an award, or a confirmation of that award, in the tripartite arbitration ordered by the Texas Court. Sea-Land argued, before this Court, that it was in compliance with this Court's orders, and that there was no conflict between the Supplementary Award and the award resulting from the ILA arbitration. This Court disagrees. The Supplementary Award is clear that additional gate work is to be divided equally between OPEIU and ILA. The award does not distinguish between additional work resulting from the transfer of work from other facilities, and additional work from other sources. In any event, the award resulting from the tripartite arbitration, which awards all gate work to the ILA, is clearly in conflict with the Supplementary Award. It is the task of resolving this conflict with which this Court is now confronted.

Appendix E

Courts have generally been strongly supportive of the use of tripartite arbitration in labor jurisdiction cases. *See USPS v. Nat'l Rural Letter Carriers Assoc. and Nat'l Assoc. of Letter Carriers*, 959 F.2d 283 (DC Cir. 1992); *RWDSU Local 390 v. Kroger*, 927 F.2d 275 (6th Cir. 1991) (involving conflicting bilateral arbitration awards); *U.S.P.S. v. American Postal Workers Union v. Laborers Int'l Union*, 893 F.2d 1117 (9th Cir. 1990); *Local 850, IAM v. T.I.M.E.-DC, Inc. and Teamsters*, 705 F.2d 1275 (10th Cir. 1983) (involving conflicting bilateral arbitration awards); *Columbia Broad. Sys., Inc. v. American Recording and Broad. Assoc.*, 414 F.2d 1326 (2d Cir. 1969). As the Supreme Court stated in *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U.S. 157, 161 (1966):

> The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or plant. *In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements*, as well as the practice, usage and custom pertaining to such agreements. *This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.*

(internal citations omitted) (emphasis added).

Plaintiff relies on *Active Glass Corp. v. Architectural and Ornamental Iron Workers Local Union 580*, 875 F. Supp. 245 (S.D.N.Y. 1995), *aff'd* 101 F.3d 687 (2d Cir. 1996) and *Del E. Webb Const. v. Richardson Hosp. Authority*, 823 F.2d

145 (5th Cir. 1987), as well as on *Gov't of the United Kingdom of Great Britain v. Boeing*, 998 F.2d 68 (2d Cir. 1993). These cases are inapposite. The cases which have supported tripartite arbitration have distinguished between labor jurisdiction cases and other cases. *Del E. Webb Const.* and *Gov't of the United Kingdom of Great Britain v. Boeing* are both non-labor cases.[4]

Active Glass Corp., in which a district court declined to order multiparty arbitration, involved a dispute between three unions and a contractor over benefit contributions. The Court took the position that *Gov't of the United Kingdom of Great Britain v. Boeing* (a non-labor case) had effectively overturned *Columbia Broad. Sys.* (a labor jurisdiction case), *Active Glass Corp.* at 252, but also noted that *Columbia Broad. Sys.* was distinguishable because *Active Glass Corp.* involved a situation in which the work at issue had already been completed, there was no risk of imminent labor unrest, and the only peril was that the contractor might be forced to pay twice for the same work. *Id.* at 252 n.8. The Second Circuit affirmed without opinion. *Active Glass Corp. v. Architectural and Ornamental Iron Workers Local 580*, 101 F.3d 687 (2d Cir. 1996). In light of the fact that the Second Circuit has nowhere indicated that *Columbia Broad. Sys.* is no longer good law, that such a conclusion would be

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4. The Texas Court distinguished *Del E. Webb*, a non-labor case in which the Fifth Circuit overturned a district court's order of tripartite arbitration, citing the fact that the tripartite arbitration in *Del E. Webb* involved a conflict between two parties who did not have written agreements to settle their disputes through arbitration. *Local 1351, Int'l Longshoremen's Assoc. v. Sea-Land Service, Inc.*, 1998 WL 15101 (S.D.Tex.).

in conflict with all of the other circuits which have reached this issue, and that independent grounds exist to justify the Second Circuit's affirmation of *Active Glass Corp.*, namely the facts enumerated by the District Court in footnote 8, specifically that the dispute did not involve an ongoing jurisdictional dispute, this Court declines to treat the Second Circuit's affirmation of *Active Glass Corp.*, without opinion, as overruling *Columbia Broad. Sys.*

The present case involves an ongoing jurisdictional dispute between the ILA and OPEIU. This is the kind of situation which has historically led to labor disputes. Both unions had agreements to arbitrate in their CBAs, covering disputes with Sea-Land. Separate arbitrations, neither involving all of the parties in interest, resulted in conflicting awards. We agree with the Texas Court that tripartite arbitration provided a pragmatic solution to the problem posed by this situation.

In deference to the tripartite arbitration award, confirmed by the Texas Court, and because it now appears that an indispensable party was absent from the arbitration before Marx, *see Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966) (refusing to enforce an arbitration award because an indispensable party was absent during the proceedings), petitioner's motion is denied in all respects. If a conflict exists between this Court's prior rulings and the rulings of the Texas Court, these issues can best be resolved through appeals to the Second and/or Fifth Circuits.[5]

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5. In its Opinion, the Texas Court stated: "If this Court overstepped its bounds, the Court respectfully notes that the Fifth Circuit can sort it out." *Local 1351, Int'l Longshoremen's Assoc. v. Sea-Land Service, Inc.*, 1998 WL 15101 (S.D.Tex.).

Appendix E

IT IS SO ORDERED.

Dated: New York, New York
May 4, 1998

s/ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN *OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO v. SEA-LAND SERVICE, INC.* DATED AND DECIDED APRIL 6, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: March 24, 1999) (Decided: APR 6, 2000)

Docket No. 98-7782

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO and OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO LOCAL 129,

Petitioners-Appellants,

v.

SEA-LAND SERVICE, INC.,

Respondent-Appellee.

BEFORE: PARKER, POOLER, *Circuit Judges*, and WEXLER*, *District Judge*.

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* The Honorable Leonard D. Wexler, of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix F

Appeal from the order of the United States District Court for the Southern District of New York (Robert P. Patterson, Jr., *Judge*) entered May 5, 1998, denying petitioners-appellants' post-judgment motion to enforce the judgment pursuant to Fed. R. Civ. P. 70.

Affirmed.

* * *

PARKER, *Circuit Judge*:

Appellants Office & Professional Employees International Union, AFL-CIO and Office & Professional Employees International Union, AFL-CIO Local 129 ("OPEIU") appeal from the order of the United States District Court for the Southern District of New York (Robert P. Patterson, Jr., *Judge*) entered May 5, 1998, denying OPEIU's motion to enforce the judgment pursuant to Fed. R. Civ. P. 70.

This case involves a jurisdictional labor dispute among two labor unions and a company that employs members of both unions. As we use the term, a jurisdictional labor dispute arises when two or more unions claim, under their respective collective bargaining agreements ("CBAs"), the right to perform the same work assignment. *See Transportation-Communication Employees Union v. Union Pac. R.R.*, 385 U.S. 157, 161 (1966). Here, OPEIU is one of the labor unions, while the other union, International Longshoreman's Association ("ILA"), is not a party. Respondent-appellee Sea-Land Service, Inc. ("Sea-Land") is the employer. The work assignment at issue concerns work at a facility at the Port of Houston in Houston, Texas.

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The issue presented on appeal derives from the issuance of contradictory arbitration awards and the entry of contradictory judgments in two different federal district courts. The first arbitration award followed two-way ("bipartite") arbitration in New York between OPEIU and Sea-Land, and resulted in OPEIU being awarded a portion of the work assignment at issue. On OPEIU's petition, the federal district court for the Southern District of New York (the "New York court") entered a final judgment confirming the award.

Subsequent to these events, ILA and Sea-Land submitted to bipartite arbitration in Texas, after which ILA was awarded *all* of the work assignment, including that portion previously awarded to OPEIU in New York. When ILA petitioned to confirm the Texas award in federal district court for the Southern District of Texas (the "Texas court"), the Texas court disregarded both arbitration awards, as well as the Southern District of New York judgment. The Texas court then ordered all three parties to participate in tripartite arbitration in Texas. ILA prevailed in that proceeding, and was awarded all of the work assignment. Following that award, the Texas court entered judgment confirming the tripartite award.

Meanwhile, while the litigation was proceeding in Texas, OPEIU returned to the Southern District of New York and made a motion pursuant to Fed. R. Civ. P. 70 to enforce the New York judgment confirming the bipartite award that favored OPEIU. By the time the New York court came to rule on that motion, the Texas court had already entered judgment in its case awarding the work to ILA. The New

York court was thus faced with two contradictory federal district court judgments, namely its own (which awarded a portion of the work to OPEIU) and the Texas judgment (which awarded all of the work to ILA). Finding that ILA was a necessary party that had been absent from the New York action, the New York court denied the Rule 70 motion, thereby refusing to give continued effect to the New York judgment. OPEIU now appeals from that denial. For the reasons set forth in the discussion that follows, we affirm.

I. BACKGROUND

Sea-Land is a cargo carrier operating out of the Port of Houston. Sea-Land employs members of both OPEIU and ILA. Both unions have CBAs with Sea-Land that call for resolution of work assignment disputes through arbitration. OPEIU's CBA contains no provision requiring OPEIU to participate in tripartite arbitration.

The dispute in this case and the Texas litigation concerns the distribution of work at the entrance-gate of the Houston facility. Gate employees track the flow of traffic and cargo in and out of the facility. Prior to 1992, there were five full-time gate workers, three from ILA and two from OPEIU. In 1992, a new computer system was implemented, resulting in the displacement of at least one of OPEIU's workers by an ILA worker.

A. *Arbitration Between Sea-Land and OPEIU*

OPEIU initiated a grievance on July 9, 1992. ILA was not a party to the subsequent arbitration and did not

participate in it in any way. Indeed, in reaching a determination, the arbitrator incorporated language from a prior, related award to the effect that, "[t]he Arbitrator is not empowered to review the ILA collective bargaining agreement. In short, the issue is not whether ILA employees or OPEIU employees are properly assigned certain work but simply whether work formerly performed by OPEIU employees was taken away from them to be performed by others." The only question presented to the arbitrator was whether OPEIU's work had been reassigned to ILA (a violation of OPEIU's CBA) or simply eliminated altogether (not a violation of OPEIU's CBA).

The arbitrator issued a final ruling on May 5, 1995, finding that there had been a reassignment in violation of OPEIU's CBA. The arbitrator ordered that the gate positions be split evenly between ILA and OPEIU, with any odd position assigned to ILA. This ruling applied not only to present work, but also to "increases or decreases" in future personnel at the gate. The immediate result was the posting of two additional OPEIU workers at the gate.

OPEIU petitioned in the Southern District of New York to confirm that arbitration award, and on June 28, 1996, final judgment was entered confirming the award. However, after entry of judgment, the parties continued to dispute the matter. On April 3, 1997, they entered a settlement agreement and "stipulation of compliance" to resolve those disputes. Among other resolutions, the parties reaffirmed their duties to comply with the arbitrator's award. On April 16, 1997, the New York court "so ordered" the stipulation of compliance. A separate judgment was not entered, and the case was marked closed.

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B. *Arbitration Between Sea-Land and ILA*

Meanwhile, in March of 1997, ILA pursued two grievances against Sea-Land.[1] In the first grievance, ILA claimed that it had the right to perform the gate work (the same gate work claimed by OPEIU) pursuant to a CBA between ILA and Sea-Land. In the second grievance, ILA claimed that the CBA entitled it to be the sole performer of the work for a new client, Maersk, Inc., which was set to begin at the port "in the near future." Sea-Land opposed the first grievance on the ground that a "court decision" (i.e., the New York judgment) had "forced" reassignment of the work. Sea-Land does not appear to have opposed the second grievance. OPEIU did not receive notice of these grievances and did not participate in the hearings.

On March 4, 1997, ILA prevailed before the grievance committee on both grievances. The committee found that all the disputed work could be performed only by ILA workers. The March 4, 1997, date is notable because on April 3, 1997, Sea-Land executed the aforementioned New York settlement agreement with OPEIU agreeing that a specified portion of the work at the gate would be performed by OPEIU's members. In other words, when Sea-Land entered the New York settlement agreement with OPEIU in April 1997, Sea-Land knew, but did not disclose to either OPEIU or the New York court, that such agreement was inconsistent with the March 4, 1997, Texas awards in favor of ILA.

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1. The parties have not disputed ILA's contention in the Texas litigation that these grievances were the legal equivalent of arbitration, and we have not considered the matter further.

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C. *The Maersk Work*

As anticipated, in July 1997, Sea-Land began to handle containers for Maersk. On July 24, 1997, OPEIU wrote to Sea-Land and alleged that Sea-Land had violated the settlement agreement by assigning OPEIU's work-slots for the Maersk work to ILA workers. OPEIU and Sea-Land then arranged to return to the New York arbitrator to arbitrate the distribution of the Maersk work. An arbitration hearing was scheduled before the New York arbitrator for September 17, 1997; as before, the hearing was not scheduled to include ILA.

D. *The Texas Petition to Confirm*

On August 22, 1997, ILA petitioned in the Southern District of Texas to confirm its two Texas awards. In its answer, Sea-Land conceded that it was not in compliance with the first Texas award (regarding the pre-Maersk work at the gate), and asserted that it could not comply, because of the pre-existing New York judgment and settlement agreement. As to the second Texas award (regarding the Maersk work), Sea-Land alleged that it was presently in compliance, but that it nevertheless intended to go forward with the scheduled September 17, 1997, New York arbitration with OPEIU. Sea-Land also proffered that if the New York arbitrator ordered the Maersk work reassigned to OPEIU, then Sea-Land would comply with such an order.

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E. *Joinder and Tripartite Arbitration*

On September 12, 1997, the Texas court stayed the OPEIU-Sea-Land arbitration on the Maersk work (five days before that arbitration was scheduled to begin) on the ground that it could interfere with the Texas court's jurisdiction. In the same order, the Texas court directed Sea-Land, OPEIU, and ILA to submit a list of proposed arbitrators so that the entire matter could be referred to tripartite arbitration. OPEIU was at the same time joined in the Texas proceeding by an order pursuant to Fed. R. Civ. P. 19. OPEIU represented at oral argument before the New York court that it was the Texas court that, sua sponte, identified the need for tripartite arbitration and which, again sua sponte, ordered OPEIU into the case for the purpose of proceeding to tripartite arbitration.

On September 26, 1997, OPEIU moved to dismiss the Texas court proceeding for lack of personal and subject matter jurisdiction. Sea-Land opposed that motion, arguing that OPEIU was a necessary party and that tripartite arbitration was "clearly appropriate" to resolve the matter. On October 3, 1997, the Texas court denied the motion to dismiss, and on October 9, 1997, ordered all three parties to tripartite arbitration.

On January 7, 1998, the Texas arbitrator awarded all the disputed gate work to ILA. Notably, the tripartite format permitted consideration of matters expressly excluded from the New York arbitration, including the conflicting provisions of both CBAs, the industry custom on work assignments, and the employer's preference. All of those questions were resolved in favor of ILA and against OPEIU.

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On January 14, 1998, the Texas court confirmed the tripartite arbitration award. *ILA v. Sea-Land Serv. Inc.*, 991 F. Supp. 825 (S.D. Tex. 1998).

Initially, the Texas court found that OPEIU had been properly joined as a necessary party because any resolution involving only one of the unions would be "incomplete and unjust" and could subject Sea-Land to inconsistent obligations. *Id.* at 827 (citing Fed. R. Civ. P. 19(a)).

Second, the Texas court found that it did have authority to stay the OPEIU — Sea-Land arbitration and to order OPEIU to participate in tripartite arbitration. Focusing on the "pragmatic and efficient" solution of tripartite arbitration, the Texas court rejected OPEIU's argument that the order of tripartite arbitration was improper because OPEIU and ILA were not parties to the same CBA arbitration agreement. *Id.* at 828-29. On the merits, the Texas court confirmed the award. *Id.* at 829. Finally, the Texas court noted that it was "cognizant" of the New York court's final judgment, but "respectfully" noted that ILA was not a party to the New York judgment, and, "[t]he Court seriously questions the validity of dispute resolution when an indispensable party, for whatever reason, is absent." *Id.* OPEIU appealed from the Texas judgment, and that appeal is pending in the Fifth Circuit Court of Appeals.

F. *OPEIU Returns to the Southern District of New York to Enforce the New York Judgment*

On October 3, 1997, i.e., after it had been joined in the Texas litigation for the purposes of proceeding to tripartite

arbitration but before tripartite arbitration had taken place, OPEIU made a Fed. R. Civ. P. 70 motion before the New York court to enforce the New York judgment.[2] *See* Fed. R. Civ. P. 70 ("If a judgment directs a party . . . to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party. . . .").

In its opposition papers — submitted after the parties had been ordered to tripartite arbitration in Texas — Sea-Land alleged that it was in compliance with the New York judgment and settlement but noted that it was "obligated to participate in the tripartite arbitration" in Texas.

The New York court denied OPEIU's Rule 70 motion on May 5, 1998, i.e., five months after the Texas court entered its judgment confirming the tripartite award. *In Re Arbitration Between OPEIU and Sea-Land Serv., Inc.*, 1998 WL 226160 (S.D.N.Y. May 5, 1998). The New York court found that the New York and Texas judgments conflicted, and that Sea-Land was not in compliance with the New York judgment. *Id.* at *3 n.3. It then analyzed the issue of tripartite arbitration and "agree[d]" with the Texas court that tripartite arbitration was both permissible and a "pragmatic solution." *Id.* at *4. The New York court then held, "In deference to the tripartite arbitration award, confirmed by the Texas Court, and because it now appears that an indispensable party [ILA] was absent from the [New York] arbitration . . . [OPEIU's] motion is denied in all respects." *Id.* (citation omitted).

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2. It is unclear whether this motion was made before or after the Texas court denied OPEIU's motion to dismiss in the Texas action.

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II. DISCUSSION

The essence of the New York court's denial of OPEIU's motion was the finding that ILA was a necessary party to the initial arbitration, and that ILA's absence rendered continued enforcement of the judgment entered on that award in New York inequitable.[3] This ruling was tantamount to a holding that a change in circumstances (namely, the determination that ILA was a necessary party) rendered enforcement of the existing judgment unjust, and that the proper remedy from the start would have been to order tripartite arbitration rather than enter judgment on the bipartite award. *See Sea-Land*, 1998 WL 226160, at *4 ("[I]t now appears that an indispensable party was absent from the [New York] arbitration . . . ."). OPEIU argues that it was entitled to the benefit of the judgment notwithstanding the changed circumstances, and that the New York court lacked the power to decline to enforce the judgment.

We begin our analysis with *Emery Air Freight, Corp. v. International Bhd. of Teamsters, Local 295*, 185 F.3d 85 (2d Cir. 1999), and we assume familiarity with that case. In light of *Emery*, it is now settled in this circuit that the district court has the power to order tripartite arbitration even absent the parties' consent to submit to tripartite arbitration, and even after a bipartite arbitration award has issued. *Id.* at 90-92.

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3. OPEIU does not expressly concede the matter, but makes no meaningful effort to dispute the determination that ILA was a necessary party to the New York litigation. We treat the matter as conceded.

One difference between this case and *Emery* is that a *judgment* was entered in this case confirming the initial bipartite award. *Cf. id.* at 87 (plaintiff complied with initial bipartite arbitration award without judicial intervention). We find that the entry of the judgment did not itself deprive the New York court of the power over its injunction, because judgments granting prospective injunctive relief are subject to the ongoing supervisory power of the court. *See* Fed. R. Civ. P. 60 (on motion, court may relieve a party from a final judgment for specified reasons); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . . . [A] court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.") (citations omitted).

We perceive nothing in this determination that weakens principles of finality beyond the inroads already held acceptable by *Emery*. As we did in *Emery*, we rely on the "discretion and equitable instinct of the district court" to consider the concerns of finality when resolving jurisdictional labor disputes. *Emery*, 185 F.3d at 92; *see Sierra Club v. United States Army Corps of Eng'rs*, 732 F.2d 253, 256-57 (2d Cir. 1984) (modification of injunction "involves a balance between the policies of *res judicata* and the right of a court to apply modified measures to changed circumstances"). To the extent that Sea-Land argues that the New York court could not reexamine its own judgment because it was *res judicata*, such argument is simply wrong in light of the existence of changed circumstances.

However, Sea-Land did not make a Rule 60(b) motion or otherwise seek relief from the New York judgment prior to OPEIU's Rule 70 motion. *See* Fed. R. Civ. P. 60(b) (procedure for obtaining relief from a judgment "shall be by motion as prescribed in these rules or by an independent action"). OPEIU argues that a party's opposition to a Rule 70 motion may not contest the underlying merits of the judgment that the movant seeks to enforce. Thus, OPEIU contends, under the existing procedural circumstances, the judgment was immune from attack, and "[o]nce the lower court found non-compliance, it was duty bound to enforce its Judgment." *Cf. Hook v. State of Ariz., Dep't of Corrections*, 972 F.2d 1012, 1014-17 (9th Cir. 1992) (in response to plaintiffs' Rule 71 motion,[4] defendant's arguments on the merits of the injunction were not cognizable; defendant was "bound" by the judgment "until the district court issues an order otherwise under Rule 60(b)").

Given the exceptional nature of jurisdictional labor disputes, and the enhanced remedial power of courts to resolve such disputes, we need not determine whether the Federal Rules of Civil Procedure permitted the remedy the New York court provided. In *Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1328-29 (2d Cir. 1969), we observed that jurisdictional labor disputes that arise under collective bargaining agreements are governed by a "new common law." *Id.* at 1328 (internal quotation omitted). *Emery* confirmed the

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4. Fed. R. Civ. P. 71 provides, "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party . . . ."

vitality of these principles. *Emery*, 185 F.3d at 90-91. Thus, even assuming that the Federal Rules of Civil Procedure did not authorize the New York court to reach the merits of its judgment, we find that the common law governing jurisdictional labor disputes did. *Compare CBS*, 414 F.2d at 1329 n.1 (in jurisdictional labor dispute, "developing common law of labor contracts" empowered district court to consolidate two arbitration proceedings without consideration of whether such consolidation was authorized by Fed. R. Civ. P. 42(a)) *with Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 267-68 (2d Cir. 1999) (in general commercial dispute, district court lacked the power to consolidate bipartite arbitrations, or to hold a tripartite hearing, where neither the terms of the arbitration agreements nor the Federal Rules of Civil Procedure granted such power).

In sum, the New York court had the power to decline to enforce the judgment confirming an arbitration award because a change in circumstances had made clear that the dispute was a jurisdictional labor dispute, that tripartite arbitration was the proper and necessary vehicle to resolve the dispute, and, thus, that the prospective relief provided in the judgment was inequitable. *See Swift*, 286 U.S. at 114-15. Given the exceptional nature of jurisdictional labor disputes, the New York court had the authority to proceed as it did regardless of any defect created by Sea-Land's failure to affirmatively seek relief from the judgment. *See CBS*, 414 F.2d at 1329 n.1. We see no meaningful distinction between the power of the court to order a tripartite arbitration in *Emery* and the power of the New York court sua sponte to defer to a tripartite arbitration in this case.

Our holding goes only to the power of the court. The fact that a court has the power to decline to enforce a judgment entered on a bipartite award does not eliminate the fact that the decision whether or not to do so remains a discretionary one. *See Emery*, 185 F.3d at 91 (when court has power to order tripartite arbitration, decision is discretionary; listing five factors for consideration); *Sierra Club*, 732 F.2d at 257 (modification of injunction is reviewed for abuse of discretion; when final injunction is at issue, inquiry is whether "there has been such a change in the circumstances as to make modification of the decree equitable").

On appeal, OPEIU contests only the power of the New York court. We are not asked to analyze the five factors set forth in *Emery* or otherwise to determine whether the New York court abused its discretion in declining to enforce the New York judgment and its appurtenant injunction. Consequently, as the ground raised for reversal is meritless, we affirm the order appealed from.

However, two points bear additional discussion. First, OPEIU complains that Sea-Land "did not see fit" to disclose that arbitration awards had been entered in favor of ILA at the time that Sea-Land entered the settlement agreement with OPEIU in New York. Although less than clear, OPEIU's contention seems to be that Sea-Land actually anticipated the need for tripartite arbitration when it entered the settlement agreement in New York, and thereby forfeited its right to obtain relief from the New York judgment. The extent to which Sea-Land anticipated the need for tripartite arbitration, and the extent to which such anticipation (if any)

weighed in favor of enforcing the New York judgment, was a matter committed to the New York court's discretion. *Cf. Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992) (declining to adopt rule to prohibit modification if party anticipated changing conditions). While OPEIU complains generally about Sea-Land's nondisclosure, it does not, as noted, contend that the New York court abused its discretion in declining to enforce the judgment and injunction; thus, we need not consider the matter further. *See LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995) ("[W]e need not manufacture claims of error for an appellant . . . .").

Nevertheless, we note that the record does not establish that Sea-Land anticipated the need for tripartite arbitration. In its answer to ILA's petition to confirm the Texas arbitration awards, Sea-Land opposed confirmation on the ground that the Texas awards conflicted with the New York judgment and, potentially, with the outcome of the upcoming bipartite Maersk arbitration before the New York arbitrator. In opposing OPEIU's Rule 70 motion, Sea- Land argued that it was still in compliance with the New York judgment and settlement agreement. In sum, Sea-Land took the position that the Texas litigation could ultimately be resolved independent of, and consistent with, the New York litigation. The record does not establish that that position — however poorly considered — was frivolous or was adopted in bad faith. It was the Texas court, based on facts unknown to the New York court, that first determined that tripartite arbitration was necessary. This determination may thus be properly described as a change in circumstance that was not

anticipated at the time the settlement agreement was entered.[5] Further, the record shows that the New York court considered Sea-Land's conduct during the litigation of this matter (including Sea-Land's decision not to disclose the Texas awards when it entered the New York settlement), as was proper.

Second, the Texas court's decision to disregard the New York judgment warrants comment. The issue of whether the Texas action constituted an impermissible collateral attack on the Southern District of New York judgment, or whether the Texas court erred in ordering tripartite arbitration, is not before us. Any perceived error committed by the Texas court should be raised in the appeal to the Fifth Circuit. What is relevant to our inquiry is whether an error committed by the Texas court affected the New York court's independent decision that continued enforcement of the New York judgment and injunction would be inequitable. OPEIU does not identify any such error.

For example, OPEIU argues that principles of *res judicata* prevented the Texas court from sending the parties to tripartite arbitration. It is difficult to conceive how

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5. Notably, there is no indication that OPEIU sought to include ILA in the New York litigation. The conditions of the New York arbitration — which prohibited the arbitrator from considering the ILA CBA — suggest that OPEIU, like Sea-Land, was in a position to consider whether a favorable award for OPEIU in New York might violate ILA's rights under its CBA. The exclusion of ILA from the New York arbitration thus suggests that OPEIU reached the same conclusion as Sea-Land, namely that the New York arbitration would not affect ILA's rights.

res judicata would apply since the two proceedings involved both different parties and different issues (the New York arbitrator, for example, gave no consideration whatsoever to the ILA CBA). Even if correct, however, this argument would not be a basis for reversing the *New York* order from which OPEIU appeals. However flawed, the Texas litigation is relevant to this case only to the extent that it brought the need for tripartite arbitration to the attention of the New York court. Once that need became apparent, the New York court was empowered to act as it did.

III. CONCLUSION

For the foregoing reasons, we affirm the order of the district court.